No. 12,231

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA AIRLINES (an Alaska Corporation),

Appellant,

vs.

ARTHUR J. OSZMAN,

Appellee.

Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court is based upon Alaska Compiled Laws (1933), Title 3, and 48 U.S. C.A. Section 101 (Territories and Insular Possessions). This court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

STATEMENT OF THE CASE.

The pleadings.

Appellee filed his complaint on June 21, 1947. The complaint alleged that between May 1, 1944 and March 31, 1947 appellee had expended the sum of One Thousand Eight Hundred Forty and 53/100 Dollars ($1,840.53) of his own money for the use and benefit of the appellant, while employed by appellant as District Traffic Manager; that this money was expended by appellee in reliance on appellant's verbal promise to pay for such expenditures; that appellee had repeatedly demanded payment of the sum, but appellant had not repaid the same nor any part thereof. Attached to the complaint as Exhibit "A", was a list of the expenditures making up the total demand. (T.R. 2-4.) Appellant's answer consisted of an allegation qualifying the corporation to appear and defend the suit and a general denial of all of the allegations of the appellee's complaint. (T.R. 6.)

The evidence.

The pertinent facts out of which this case arose can be briefly stated.

Appellee was employed by appellant during two periods, separated by an interval of a year and three months. (T.R. 114, 51-54, 26.) He was first employed by appellant's Operations Manager, Frank Pollock, on May 4, 1944, and was assigned to duty in Juneau, Alaska. (T.R. 26.) Appellee continued to work for appellant in Juneau and in Anchorage until June 30, 1945, when he resigned his position and went to work

for Ray Martin in Kodiak. (T.R. 107.) Ray Martin was the local agent for appellant in Kodiak until August 15, 1945; at that time appellant's certificate to Kodiak was cancelled and Martin shifted his agency to Pacific Northern Airlines. (T.R. 53, 108-9.)

Appellee continued to work for Martin in Kodiak until September 14, 1946, returning then to Anchorage and to the employ of the appellant. (T.R. 112.) After approximately 30 days in appellant's Juneau office, he was transferred to Seattle, where he was notified of his discharge on March 8, 1947. (T.R. 54, 167.) The discharge was effective on March 24, 1947.

Thereafter, appellant's treasurer, Joseph E. Griffin, received two memorandums from appellee, each dated March 13, 1947, demanding reimbursement from appellant for various items of expense and transportation in the total sum of $1,840.53. (T.R. 4, 33-36, 168.) Some of these items dated back to the first months of his first period of employment, including an item of $219.30 for transportation from Minneapolis to Fairbanks to accept employment with appellant in May, 1944. (T.R. 28, 168.) According to these memoranda, appellant was indebted to appellee in the sum of $1,209.43, in June, 1945, when he went to work for Martin in Kodiak. (T.R. 113.) The balance of the total claimed covered travel expenses in Juneau, and elsewhere, and expense accounts in Seattle during the second period of employment. (T.R. 4.)

Arthur J. Oszman.

Only two witnesses testified at the trial. Appellee, testifying in his own behalf, claimed to have been promised reimbursement for the trip from Minneapolis by Pollock in April, 1944. (T.R. 27, 87.) Appellee stated that he had submitted his accounts for additional expenses regularly each month during the first period of his employment, in detail. (T.R. 36-51.) Neither the originals nor copies of these accounts were produced at the trial. (T.R. 36.) Appellee testified that he had previously submitted the originals and copies to appellant's Treasury Department; a "recap" of the amounts claimed was submitted at the trial. (T.R. 36-39.) According to appellee, these amounts represented sums which he was required to expend on company business out of his personal funds. He gave a variety of examples of such expenditures. (T.R. 40-42, 124-129.) Appellee maintained that he had written a number of notes or memos to appellant's officials between the fall of 1944 and June 30, 1945, requesting payment of the sums alleged to be due him. He stated that he kept no copies of any of these letters, and neither copies nor originals were offered in evidence. (T.R. 132-137.)

Appellee named a number of appellant's employees to whom he claimed to have addressed either oral or written demands for payment. Specifically, he named Odenwalder, Castner, Law, Hedman, Edwards, Perry, Seno, Nordman, Bartoo and Hoppin. He admitted that none of these persons were now employed by appellant. (T.R. 145-146, 157-158.)

Joseph E. Griffin was treasurer of the company when appellee was re-employed in September, 1946, and continued as such throughout the second period of appellee's employment. Appellee spent several hours with Griffin in Seattle a few days before Christmas of 1946. He admitted that he did not discuss the subject of appellant's alleged indebtedness to him with Griffin on that occasion, and that he never made any written demand on Griffin prior to March 13, 1947, after he had been notified of his discharge. (T.R. 143-145.)

Joseph E. Griffin.

Joseph E. Griffin, a certified public accountant, was hired by appellant as Comptroller on February 4, 1946; in December of the same year, he was elected Treasurer. (T.R. 160.) Upon assuming his duties, Griffin made a careful study of an audit of appellant which Price Waterhouse & Company had just completed, covering the period of 3 years and 9 months prior to July 1, 1945. During February and March, 1946, he made a careful examination of appellant's books and records. (T.R. 160-162.) Griffin testified that neither the audit nor the books and records of the company revealed any account payable, indebtedness or obligation to appellee. (T.R. 162-163.) The only item in the books and records of the company relative to appellee, "was a recap of the petty cash fund in Juneau indicating the fund was $26.00 short, which we wrote off to expense". (T.R. 163.)

Griffin testified that he spent several hours with appellee, both in the Seattle office and the Washington Athletic Club, on one occasion in December, 1946. Although the two men discussed appellee's practice of deducting his expense account from petty cash, as well as a salary increase then due, appellee did not once mention the sums which he now claims were then owing by appellant. (T.R. 164, 168-169.) Griffin never was notified of any claim by appellee prior to the letters from appellee dated March 13, 1947, five days after he had been notified in writing of his discharge. (T.R. 167, 169.)

Verdict, judgment and appeal.

The jury found that the appellee was entitled to recover the sum of $1,840.53 from appellant, together with interest at the rate of six percent (6%) per annum. (T.R. 196.) Judgment was entered accordingly on the 2nd day of July, 1948. (T.R. 10.) Appellant filed a motion for new trial which was denied on June 4, 1948. (T.R. 10-12.) Appellant thereupon filed his petition for allowance of appeal on August 17, 1948 (T.R. 13), and filed his assignment of errors. (T.R. 14.)

SPECIFICATION OF ERRORS.

It is not our intention to set forth or argue all of the assignments of error appearing in the transcript. (T.R. 14-15.) It is our contention that the court did err in the following particulars:

1. That the court erred in failing to instruct the jury, as requested by the appellant in the appellant's proposed instruction #2, as follows:

> "2. In this case there has been conflicting testimony as to whether or not the plaintiff made prompt demands for the payment of the amounts which he claims. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he now sues, is susceptible of various explanations consistent with his theory of the justness of his claim, and it is for you to say whether or not the plaintiff has offered one that is satisfactory or not."

Because of the court's failure to give the requested instruction, the entire theory of the defense was not submitted to the jury by the court.

2. That prejudicial error was committed in failing to instruct the jury as requested by the appellant in the appellant's proposed instruction #3, as follows:

> "3. In this case there is conflicting testimony on the part of the plaintiff and the defendant. The credibility of the witnesses is a matter which is within your province to determine. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sues, is a matter which may be considered by you in passing upon the credibility of the plaintiff."

The failure to give this proposed instruction, coupled with proposed instruction #2, meant that the court failed to submit to the jury the entire theory of the defense. . .

ARGUMENT.

I. IT WAS PREJUDICIAL ERROR FOR THE COURT TO REFUSE TO INSTRUCT THE JURY AS FOLLOWS: "IN THIS CASE THERE HAS BEEN CONFLICTING TESTIMONY AS TO WHETHER OR NOT THE PLAINTIFF MADE PROMPT DEMANDS FOR THE PAYMENT OF THE AMOUNTS WHICH HE CLAIMS. YOU ARE INSTRUCTED THAT THE FACT THAT THE PLAINTIFF MAY HAVE SUFFERED A LONG PERIOD OF TIME TO ELAPSE WITHOUT MAKING DEMAND OR BRINGING SUIT FOR THE ALLEGED ITEMS OF INDEBTNESS FOR WHICH HE NOW SUES, IS SUSCEPTIBLE OF VARIOUS EXPLANATIONS CONSISTENT WITH HIS THEORY OF THE JUSTNESS OF HIS CLAIM, AND IT IS FOR YOU TO SAY WHETHER OR NOT THE PLAINTIFF HAS OFFERED ONE THAT IS SATISFACTORY OR NOT."

A. The evidence offered at the trial presented a distinct conflict as to whether the appellee had ever made any demand upon the appellant for payment of the sums claimed to be due, prior to the appellee's discharge. According to the appellee, he had vigorously pressed his claims upon numerous occasions, both orally and in writing. (T.R. 99, 104, 105, 106, 111.) On the other hand, appellant's Treasurer testified that there was nothing in the audit, or books and records of the company to indicate any indebtedness to appellee, and that appellee never made any demand for payment from the time of re-employment in Sep-

tember, 1946, until after his discharge in March of 1947. (T.R. 162-164, 168.) Appellee admits that he made no written claim of any kind on appellant during this period, nor during the previous extended period of employment by Martin in Kodiak. He also admitted that he did not discuss the alleged indebtedness with Griffin, appellant's Treasurer, when they spent several hours together in Seattle shortly before Christmas of 1946. Upon this state of the evidence, the jury could either believe that appellee had "repeatedly demanded payment" as he had alleged in his complaint, or that he had never demanded any of these sums from the appellant until after his discharge. If the latter conclusion could be drawn from the facts, it would support a strong inference that appellee's entire claim was fabricated and motivated by pique at his discharge, and that in fact appellant owed him nothing.

There are a great many legal situations in which human conduct may be significant in evaluating the merits of the cause. Prior conduct of the plaintiff suggesting that his present contentions are exaggerated may be evidence of the most persuasive sort.

> *Carpenter v. Baltimore & Ohio R. Co.* (C.C.A. 6th) 109 F. (2d) 375, 379.

Thus, the failure to present a claim with reasonable promptness, a delay in instituting a prosecution, an evident reluctance to seek redress for an alleged wrong, or the failure to sue or prosecute in the jurisdiction or court which would naturally be sought, may

be some indication of a belief in the weakness of one's cause.

> "These are but a few illustrations of a great variety of the party's conduct which may be and constantly is inquired into as affecting his belief in the merits of his cause."
>
> II Wigmore, *Evidence* Sec. 284 (3rd Ed.)

Or, as Justice Brandeis pointed out in *United States v. Tod,* "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." 263 U.S. 149, 153, 44 S. Ct. 54, 56, 68 L. Ed. 221, 224.

See also,

Moncado v. Ramsey (C.C.A. 8th), 167 F. (2d) 191.

Failure to make demand for payment of a claim for an extended period of time is obviously conduct which tends to reflect on the validity of the claim. Evidence as to delay of this type is always admissible; it may be considered as having some logical tendency to discredit the claim.

Walker v. Harvey (C.C.A. 3rd), 108 Fed. 741;

Pauling v. Pauling (C.C.A. 8th), 159 F. (2d) 531;

Page v. Hazelton, 74 N.H. 252, 66 Atl. 1049;

Webster v. Sibley, 72 Mich. 630, 40 N.W. 772;

Shadock v. Alpine Plank-Road Co., 79 Mich. 7, 44 N.W. 158;

Hubenthal v. Gibbons, 168 Iowa 630, 150 N.W. 1067.

For example, in *Page v. Hazelton,* the defendant was permitted to prove that at a time when the plaintiff claimed the defendant, then living and solvent, was indebted to him in a large sum, the plaintiff told a witness that he was unable to pay a note which he owed. The court noted that this evidence tended to show that the plaintiff was in need of money at a time when, according to his present claim, the defendant had cash available and could have paid the claim had it been asserted. 74 N.H. 252, 66 Atl. 1049.

> "The plaintiff's failure, in this situation, to demand or attempt to collect his debt of a responsible debtor for a considerable time, and until after the death of his alleged debtor, is a circumstance which has some logical tendency to discredit his present claim. Failure to make claim when occasion therefor exists has some tendency to prove the invalidity or non-existence of the claim."

And, in *Webster v. Sibley,* 72 Mich. 630, 40 N.W. 772, the defendants offered to prove that the plaintiff never made known that he had a claim or informed the defendants thereof until two or three years after he was entitled to the pay he claims. The court commented,

> "When the omission to make demand for a claim against a debtor may be taken as a circumstance against its existence, depends upon the circumstances of each particular case. Among business men in cities, transacting large amounts of business, claims are liquidated every few days, and settlements made on short time, and the presump-

> tion arises much sooner than in the country, where longer credits are usually extended; but in all cases the testimony is competent, and the question is one for the jury, and we think the testimony offered was proper in this case." 40 N.W. 772, 775.

Similarly, in *Pauling v. Pauling* (C.C.A. 8th), 159 F. (2d) 531,

> "Appellant's failure for nearly 13 years after the effective date of the divorce decree to assert the rights which she now claims, and Pauling's failure to recognize these rights, is some evidence that neither she nor Pauling placed the interpretation upon the decree which she now asserts."

and further,

> "And the course pursued for years by both appellant and Pauling in carrying out the terms of the divorce decree is strong evidence of the meaning which both of them placed upon it." 159 F. (2d) 531, 536, cert. den., 67 S. Ct. 1192.

Evidence of delay in asserting a claim being properly admissible, a legal theory of either party based on such evidence must be submitted to the jury by the instructions. It is prejudicial error for the trial court to refuse to give a requested instruction based on the theory of unreasonable delay, if there is evidence in the record tending to support such a theory.

> *Shadock v. Alpine Plank-Road Co.,* 79 Mich. 7, 44 N.W. 158;
>
> *Hubenthal v. Gibbons,* 168 Iowa 630, 150 N.W. 1067.

Thus, in the *Shadock* case, the plaintiff brought suit for personal injuries resulting from being thrown off his wagon by a log in the road. The suit was not begun until nearly six years after the accident; nevertheless the jury were instructed that they should draw no prejudicial inferences from the delay to sue. Because of this error, among others, the judgment was reversed and a new trial granted. Regarding the delay, the court said:

> "In this connection, we also think it was error to to prevent the jury from taking into account, for any purpose, the long delay in suing. No one claimed that the action was barred, if brought within six years. But courts of equity, when dealing with matters of fact not barred by lapse of time, are in the every-day habit of considering delay as one of the elements of judgment, and of requiring stronger testimony in stale cases. The whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting at precise facts. Very few persons preserve such memoranda or other means of evidence as will enable them to show what was the condition of affairs at a remote period, which they have had no occasion to recall or remember. It would be very hard justice to prevent juries from considering what courts, as judges of fact, consider in similar circumstances. Delay is in itself a circumstance in human conduct which, while the law raises no absolute presumption from it, is nevertheless, in many cases, very significant. There is, in all controversies of this kind, some occasion for considering many questions of human conduct, and many probabilities. Testimony of

old transactions is seldom perfect, and human memory, where all witnesses survive, is more or less fallible. It has been found by legislatures always that time affects the accuracy and preservation of testimony so much that it is safer to fix a period of actual bar than to leave persons exposed to injustice from stale demands. It is not reasonable to hold that a difference of a day or a fortnight out of six years shall prevent a jury from weighing facts which in so short a time would be conclusive. *We can easily see how delay, in such a case as the present, might have rendered it very difficult to get at the truth, or to meet a false charge. Whether the difficulty actually appeared, we cannot tell; but it was before the jury, and they should have been allowed to weigh it.* It would be, for example, somewhat difficult for defendant, without special reasons, to be able to know or show the weather, or the precise conditions of the roads, or who were on it, at a certain hour of the day, six years before. The plaintiff himself could not fix the day of his accident nearer than 'January 20 or 22, as near as I can recollect,' and no other witness fixes the day at all. There would be a similar difficulty in finding out, after such a lapse of time, what injuries were suffered and their treatment. Small shades of difference in facts might be decisive on one side or the other. Delay may or may not have been faulty, and the difficulty created by it may have been more or less; but it cannot be said that a jury would have no right to consider it in all its bearings." 44 N.W. 158, 159. (Emphasis supplied.)

A case exactly in point is that of *Hubenthal v. Gibbons,* 168 Iowa 630, 150 N.W. 1067:

"The defendant requested the court to give to the jury the following instruction 16:

'The jury is instructed that, while the defendant, Gibbons, does not plead the statute of limitations as a legal defense to this action, nevertheless, if the jury find from the evidence that, after the time the plaintiff claims he paid the note in controversy, said defendant, Gibbons, visited Keokuk on business and pleasure on several occasions, he (Gibbons) met and conversed with plaintiff, Hubenthal, and if you further find from the evidence that said Hubenthal did not say or intimate to Gibbons anything concerning said note, or that he had paid the said note, or that said Gibbons was indebted to him in any way, and if you further find from the evidence that the plaintiff, Hubenthal, made no demand of any kind on said Gibbons to pay said note until August 6, 1907, such facts should be considered by you in connection with all the facts given in evidence in determining wherein lies the truth of the controversy.'

This was refused. Nor was the subject referred to in any manner in the instructions given.

We think that the requested instruction was peculiarly appropriate to the evidence in the case. Except for the nonresidence of the defendant, the law would have conclusively presumed payment by reason of the lapse of time. Because of the nonresidence, the defendant was not entitled to this conclusive presumption. *But, under the circumstances shown, the long silence of the*

plaintiff was very significant, and clearly warranted an inference by the triers of fact that the debt had in some manner been satisfied. It was clearly the right of the defendant to have the attention of the jury directed to such fact. In the light of the long acquiescent conduct of all the parties to the contract, the facts shown in support of the defense are very persuasive. It is not readily conceivable that such a transaction could have been so completely forgotten by all the parties in interest if it had not been closed in some manner. So far as appears the plaintiff never would have awakened to his cause of action were it not that in 1907 the Commercial Bank failed and went into bankruptcy. This note was found among the other old papers and was delivered to the plaintiff. Thereupon he promptly drew on the defendant for $400 through a Chicago bank. *We think it clear that the defendant was entitled to the requested instruction, and that its consideration by the jury was highly important to a just determination of the case.*" 150 N.W. 1067, 1068. (Emphasis supplied.)

B. It is a fundamental rule of instructions that they should state the law of the case for the information of the jury. If there is any evidence tending to support the theory of a party to the case, that evidence should be submitted to the jury under proper instructions.

Greenleaf v. Birth, 34 U.S. 292;
Stewart v. Sonneborn, 98 U.S. 187, 196;
Ranney v. Barlow, 112 U.S. 207, 28 L. Ed. 663;
United States v. Messinger, 68 F. (2d) 234 (C.C.A. 4th);

Maupin v. Baker, 402 Ky. 441, 194 S.W. (2d) 991;

Paddock v. Mason, 187 Va. 809, 48 S.E. (2d) 199;

Smith v. Maher, 84 Okla. 49, 202 Pac. 321, 23 A.L.R. 270.

As Mr. Justice Woods points out, *Ranney v. Barlow:*

"We think there was error in the charges complained of. To test their correctness we must assume the truth of the facts that the testimony submitted to the jury tended to prove. It was the duty of the court to submit to the consideration of the jury the testimony adduced by the defendant to sustain the defense set up in his answer, and the charge should have been based upon the hypothesis that the defenses that the testimony tended to prove were proven." 112 U.S. 207, 215.

And the court in *Smith v. Maher* is even more explicit:

"It is the duty of the court to submit to the jury under proper instructions the theory of a party to an action, where there is any evidence tending to support it, and where the general instruction given by the court fails to present the theory of a party to an action, and refuses a special requested instruction that in substance presents the theory of such party to the jury, such refusal constitutes reversible error." 202 Pac. 321, 324.

So, in the present case, where there was undisputed evidence of a considerable delay in the presentation of a claim, and some evidence, albeit disputed, that the claim had never been presented to appellant until

after appellee's discharge, this theory should have been presented to the jury through the requested instruction.

II. THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY THE DEFENDANT IN ITS THIRD PROPOSED INSTRUCTION, THAT: "IN THIS CASE THERE IS CONFLICTING TESTIMONY ON THE PART OF THE PLAINTIFF AND THE DEFENDANT. THE CREDIBILITY OF THE WITNESSES (154) IS A MATTER WHICH IT IS WITHIN YOUR PROVINCE TO DETERMINE. YOU ARE INSTRUCTED THAT THE FACT THAT THE PLAINTIFF MAY HAVE SUFFERED A LONG PERIOD OF TIME TO ELAPSE WITHOUT MAKING DEMAND OR BRINGING SUIT FOR THE ALLEGED ITEMS OF INDEBTEDNESS FOR WHICH HE SUES, IS A MATTER WHICH MAY BE CONSIDERED BY YOU IN PASSING UPON THE CREDIBILITY OF THE PLAINTIFF."

Appellee's entire case depended on his own testimony. Any evidence tending to affect belief in his credibility, and thus to establish the theory of the defense, should have been submitted to the jury by the instructions. It is unnecessary to reiterate at this point the arguments previously made herein on this point.

Delay in presenting a claim or demand may be cogent evidence that the party has little faith in it, or that it is advanced from improper motives.

As the court stated in *Walker v. Harvey* (C.C.A. 3rd) 108 Fed. 741, 742:

> "As bearing upon the credibility of the witnesses and the probabilities of the case, we cannot say that any error was committed by the court in saying to the jury that they might take into consideration the delay of the plaintiffs in bringing

suit. That delay was most unusual, and was a circumstance unfavorable to the plaintiffs."

The court's general instructions did not call the jury's attention to this pertinent feature of the evidence. This was a prejudicial error.

CONCLUSION.

In summarizing, appellant submits:

I.

The trial court committed prejudicial error in refusing to instruct the jury on the question of the plaintiff's delay in submitting his claim, as requested by appellant in its "Second Proposed Instruction".

II.

The trial court committed prejudicial error in refusing to instruct the jury that the plaintiff's delay in submitting his claim could be considered by them in weighing his credibility, as requested by appellant in its "Third Proposed Instruction".

For the foregoing reasons, we believe that the judgment should be reversed.

Dated, Anchorage, Alaska,
August 13, 1949.

Respectfully submitted,
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